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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 138

WILLIAM MURPHY and JOHN MOODY, SR.,

Petitioners,

—v.—

THE WATERFRONT COMMISSION OF NEW YORK HARBOR.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITIONERS' REPLY BRIEF

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I

Respondent's major thrust continues to be (as was true in their Brief In Opposition) the argument of "waiver" and "estoppel" in regard to petitioners' right to rely on the privilege against self-incrimination. In Point VI of our brief on the merits herein we anticipated this argument and we dealt with it rather extensively, but respondent's insistence in pressing this argument prompts us to add the following:

Respondent's claim (see p. 29 of their brief) that petitioners did not invoke the *federal* privilege against self-incrimination until they were tendered immunity in the respondent Commission's proceeding of October 27, 1961, overlooks the fact that prior to the latter proceeding, to wit, in the Commission's proceeding of October 3, 1961, petitioners invoked their "constitutional" privilege and they referred expressly to the "Fifth Amendment" (R. 19-31,

36-43, *passim*). This last-mentioned proceeding of October 3, 1961 was the earliest time when petitioners had any occasion to invoke any privilege against self-incrimination—as we have fully explained in Point VI of our main brief—and they did so in terms which leave beyond possible doubt that they were invoking the *federal* privilege. Aside from petitioners having mentioned the Fifth Amendment in the proceedings of October 3, 1961, their reference to the "constitutional" privilege was sufficient in itself to convey this same federal meaning, for the simple reason that there exists no *constitutional* New Jersey State privilege against self-incrimination, this privilege in New Jersey being purely statutory (N.J.S.A. 2A:84A-18, 19—quoted in our main brief at pp. 78-79). We hardly expect respondent to claim that its hearing officer and its counsel at the proceedings of October 3, 1961 were ignorant that such is the law of New Jersey. And we point out that, repeatedly at the hearing of October 3, 1961, respondent's hearing officer and counsel explicitly construed the witnesses' invocation of the privilege as meaning the "constitutional" privilege (R. 19-31, 36-43, *passim*).

Incidentally, in connection with our demonstration in Point VI of our main brief that the respondent Commission on October 3, 1961 expressly recognized petitioners' rights to invoke their constitutional privilege against self-incrimination, we note that this express recognition occurs some 25 or more times in the record (R. 19-31, 36-43, *passim*).

Even as concerns the petitioners' testimony before the respondent Commission in May 1960—which led to the prior contempt of which petitioners were ultimately purged in October 1961 by invoking the privilege against self-

incrimination (R. 46)—there is no basis for respondent to argue "waiver" or "estoppel". For in that May 1960 proceeding the counsel for petitioner Moody* expressly stated that although the privilege against self-incrimination was not being asserted "at this time", the privilege would be asserted "when the question arises and we feel any questions would involve any self-incrimination * * *" (R. 195). Thereafter, as just mentioned, the petitioners did assert their privilege against self-incrimination (October 3, 1961), and they were thereupon purged of contempt (October 4, 1961—R. 46); and, be it noted, all of this occurred squarely within the confines of the proceedings which led to the prior contempt conviction, i.e., the very proceedings which respondent goes on stubbornly claiming were the ones in which petitioners waived or were estopped from claiming the privilege.

Our above demonstration that petitioners' right to invoke the privilege against self-incrimination stood expressly reserved by petitioners on the record from the very outset of the original contempt case and that it was ultimately expressly asserted in that same case (resulting in purgation), makes it unnecessary, really, to offer any further reply to respondent's contention that the first and second contempt cases constitute a single continuous proceeding in which (according to respondent's argument) an irretrievable waiver and estopel took place. We would respectfully call the Court's attention to our argument on this at pp. 101-102 of our main brief.

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* Throughout these proceedings all parties have treated points raised on behalf of either petitioner as inuring to the benefit of both of them.

II

Respondent, and apparently also some or all of the *amici curiae*, are willing to have the Feldman case overruled if that is the only way to save the power of the States to extort testimony by conferral of immunity which does not cover federal crimes. We add the following to our main brief on this subject:

Even if this Court in the instant case should both overrule *Feldman* and decline to overrule *Knapp* v. *Schweitzer*, due process would still require a reversal of the contempt convictions of the petitioners Moody and Murphy because these petitioners took their stand in the proceeding below in the light of the existing *Feldman* rule that State-coerced testimony would be admissible against them in a federal prosecution. In that posture of the decisional law of this Court, petitioners were entitled to believe that, by declining the proffered State immunity through fear of federal incrimination, they could realistically thereafter invoke the assistance of this Court against the afflictions of the existing Feldman-Knapp "whipsaw". In other words, had the *Feldman* rule not been in existence at the time of petitioners' commission of the alleged contempt, petitioners and their counsel (who is also their counsel before this Court) would surely have paused before risking petitioners' commission of such alleged contempt. Therefore, if now this Court should overrule *Feldman* but not *Knapp*, petitioners as a matter of due process would be entitled to a vacating of the contempt judgments here under review. Petitioners have never had an opportunity to consider their position in the light of any such change in the *Feldman* rule. Cf. this

Court's language in *NAACP* v. *Alabama*, 357 U.S. 449, 457-458:

> "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in State courts of their Federal constitutional rights."

And see the invoking of the above-quoted principle by the dissenting Justices in *Gotthilf* v. *Sills*, — U.S. —, 11 L. Ed. 2d 159, 162, 32 U.S. Law Week 4007, 4008.

Further as respects the suggestions by respondent and by the *amici curiae* that this whole problem can be swept under the rug by overruling *Feldman*: All of these suggestions in this case are coming from State law enforcement personages. These State personages are blithely saying to this Court, in effect, "Do not curb *our* law enforcement powers; curb the Federal Government's instead." That is, these State personages are saying to this Court that the State immunity powers ought to remain untrammeled and that this will be rendered more palatable constitutionally if the Federal law enforcement authorities are not allowed to benefit from the exposés achieved by the State immunity power. Let the States go on playing the "anti-crime" game in a constitutionally dubious way, is the theme; and this will be alright so long as the Federal authorities are obliged to keep constitutionally clean. This, we submit, falls below the standards of that Constitutional discourse which is fitting in this Highest Judicial Forum of the Land. This is not worthy Constitutional discourse under the doctrinal standards which ought to prevail in a Great Constitutional Case. It is too shrewd. Doctrinal guile has no place in this Forum, least of all in a case in-

volving the Bill of Rights. Besides, all of these suggestions for aggrandizement of the State-law-enforcement power at the expense of the Federal law enforcement power have not had the benefit, in this case, of any expression of the views by the Federal Government's own spokesmen. The Solicitor General has not been heard from in this case. Shall *Feldman* be overruled and *Knapp* v. *Schweizer* be ratified without hearing from the Solicitor General of the United States? To be sure, we well realize that it is not for us to alert the Solicitor General in the present circumstances, and we have not done so nor shall we. But we do feel entitled to bring to the Court's attention, as we are here doing, that an impressive panoply of State law-enforcement officialdom are calling upon this Court to effect a fundamental alteration in the distribution of Federal and State powers of law enforcement, while no Federal voice is being heard on the issue.

And we might add, on this same theme, that unheard from thus far in this case is not only the Solicitor General of the United States in his capacity as the spokesman before this Court for the Executive Branch of the Federal Government, but the latter official is also unheard from in his capacity as one of the Attorney General's delegated legal advisors to the Legislative Branch. Should not there be a voice speaking in this case as *amicus curiae* for the Congress of the United States? Does the Congress want the epochal redistribution of law-enforcement powers—as between the Federal and the State governments— which is sought by the respondent Waterfront Commission and its *amicus* allies?

In short, the suggestion that *Feldman* but not *Knapp* be overruled opens a Pandora's Box of demonic vexations for

constitutional policy in this country and for the country's traditional distributive governmental arrangements at the most fundamental levels. Shall an issue of such National magnitude be resolved on the basis merely of the papers of the non-Federal parties and of the non-Federal *amici* presently before the Court?

III

We are obliged to reply, briefly, to some of respondent's suggestions concerning the reasonableness of petitioners' fear of Federal incrimination:

(a) At page 34 of their brief respondents say, referring to the May 1960 work stoppage here involved, that "no Federal prosecutor in the almost four years that have passed has evinced the slightest interest in this matter." Not only is this statement of the respondent absolutely devoid of any basis in the record, but as acutely as possible it focuses attention upon our much-emphasized theme in this case that we were wrongly denied discovery which could have shed light upon this very area.

(b) Similarly, at p. 39 of its brief respondent says, "The record is bare of any evidence of cooperation between the Commission and federal law enforcement officers in *this* case" (emphasis by respondent). This statement in respondent's brief was offered in an effort to meet the quotation in our brief which we took from *Cleary* v. *Bolger*, 371 U.S. 392, 394, where this Court noted that the Waterfront Commission of New York Harbor is an agency which "worked in close cooperation with the Customs Service in matters of law enforcement on the waterfront." Our comment on respondent's above-quoted statement that the in-

stant record shows no specific evidence of cooperation with Federal agencies "in *this*" case, is that here, once again, the refusal of the Courts below "in *this* case" to allow us the discovery procedures which could have illuminated this very area, forms an integral part of the overall constitutional injustice "in *this* case" which so cryingly calls for this Court's intercession.

We would add this one further thought concerning the respondent Waterfront Commission's intrinsic role as a quasi-Federal law enforcement agency: That this agency, by the very nature of its functions, must be continually concerned with the enforcement of Federal criminal laws affecting the interstate and foreign commerce activities on the waterfront of New York Harbor, is dramatically evidenced by the fact that, in all the mountainous efforts that respondent has made in this litigation to find some State rather than Federal "crimes" to which the herein proffered immunity could relate, respondent has been able to come up with only one such State crime or criminal statute, namely, the New York State "coercion" provision (N.Y. Penal Law § 530) (Resp. Br. pp. 38-39). This is what is known in the vernacular as "really reaching", or as coming "from left field".

The real situation is that the functions of the Waterfront Commission of New York Harbor in its anti-crime activities are for all practical purposes not different from the functions which the Federal Bureau of Investigation would perform in that same field; and that conferral of "immunity" by the Waterfront Commission where such conferral leaves the "immunized" person one hundred percent unprotected against Federal incrimination and prosecution is for all

practical purposes not only no "immunity" at all but on the contrary spells a virtually sure incriminatory doom at the hands of the Federal law enforcement authorities.

(c) At p. 36 of their brief respondents say that "petitioners' sworn testimony before the Superior Court was that in effect they feared incrimination only for theft". This is absolutely belied by the record (R. 118-140). Moreover, in counsel's oral presentation before the Superior Court (R. *102-106*), in our memorandum of law before that Court, and in our briefs in the State appellate courts, every single one of the Federal criminal statutes which we have cited to this Court as justifying petitioners' reasonable fear of federal incrimination, was cited and discussed. The above mentioned memorandum of law which was filed in the Superior Court, Law Division, was expressly incorporated in the record of the contempt proceedings before that Court (R. 108-109).

(d) Additional indication of the respondent Commission's determination, from an early stage of these proceedings, to incriminate the petitioners in ways which would *ipso facto* import Federal criminal sanctions, is found at R. 19, 23-25 and 35, where the Commission's spokesman admitted that in public pronouncements which the Commission had made concurrently with the instant proceedings the petitioners had engaged with others in a criminal conspiracy relating to the May 1960 work stoppage.

IV

Altogether incomprehensible is respondent's statement at p. 38 of its brief that the question of N.L.R.B. preemption "was not one of the questions presented by petitioners in

their petition for certiorari [and] it is of course not properly before the Court." We respectfully point out that this question was expressly embraced within and preserved by question no. 3 of our "Questions Presented" in our petition for certiorari.

V

At p. 48 of its brief respondent states, by way of answer to our claim that petitioners were denied a constitutionally fair trial on the issue of their intent to commit civil contempt, that "* * * petitioners, who are free on bond pending this Court's decision, may at any time purge themselves of civil contempt by testifying * * *". This argument of respondent's overlooks the fact that the sentence under which petitioners rest for the conviction of civil contempt includes a fine of $50. (R. 183). This sentence has been expressly upheld by the Supreme Court of New Jersey (R. 240). The applicable New Jersey statutes and Rules of Court evidently contemplate that such fine of $50., once imposed for civil contempt, remains irretrievably imposed and must be paid whether or not purgation occurs (the pertinent citations will be given in a moment); and that is exactly the way that the Supreme Court of New Jersey on appeal has administered the $50. fine provision in this case (R. 240). The pertinent New Jersey Rule of Court (which has the force and effect of a statute), namely, R.R. 4:87, is quoted in part in the appendix to our main brief, pp. A-7 to A-9; by inadvertence we neglected to quote the third subdivision of this Rule 4:87, which reads as follows (R.R. 4:87-3):

"4:87-3. Trial; Judgment

The court in its discretion may try the issue without a jury, but this rule shall not supersede any statutory right to trial by jury. Upon the hearing of any charge for contempt other than a contempt stated in Rule 4:87-1, the court shall determine whether the contempt was criminal or civil in nature, or both. Where the contempt is primarily civil in nature and the person in contempt shall have disobeyed a judgment, order or process of the court, he shall stand committed and remain in close custody until the judgment, order or process is obeyed and performed and until such fine as may be imposed for his contempt in accordance with N.J.S. 2A:10-5, with costs, is fully paid, or until the further order of the court. Upon a finding of guilt in a proceeding criminal in nature, the court shall enter an order fixing the punishment."

The provision N.J.S. 2A:10-5 which is referred to in the above quoted R.R. 4:87-3 reads as follows:

"2A:10-5. Civil contempt; punishment

Any person who shall be adjudged in contempt of the superior court or county court by reason of his disobedience to a judgment, order or process of the court, shall, where the contempt is primarily civil in nature and before he is discharged therefrom, pay to the clerk of the court, for the use of the state or the county, as the case may be, for every such contempt, a sum not exceeding $50. as a fine, to be imposed by the court, together with the costs incurred."

This factor, then, of the existence in our case of a punitive fine for civil contempt which perdures irrespective of purgation, lends to the case, as we urged in our main brief

(Point II) the character of so inextricable an intermingling of the "civil" with the "criminal" contempt features as to entitle us to contend before this Court that all those constitutional incidences of fair procedure which attach to criminal contempt* should attach also to the incongruous "civil" contempt here involved.

CONCLUSION

It is respectfully submitted that the judgment under review should be reversed.

Respectfully submitted,

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* Including jury trial, should the presently pending case of Governor Barnett of Mississippi result in the enunciation by this Court of a new requirement of jury trial in criminal contempt.